Number 219.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1923.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

V.

W. H. OSBORNE, JR., AS TAX COMMISSIONER OF THE STATE OF NEBRASKA, GILBERT E. HAASE, AS COUNTY TREASURER, BUFFALO COUNTY, NEBRASKA, ET. AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR DISTRICT OF NEBRASKA

BRIEF OF APPELLEES.

O. S. SPILLMAN, Attorney General of Nebraska.
GEO. W. AYRES, Asst. Atty. Gen'l of Nebraska.
HUGH LAMASTER, Asst. Atty. Gen'l of Nebraska.
Solicitors for Appellees.

STATEMENT.

This is a direct appeal from the United States District Court, District of Nebraska, constituted under section 266

of the Code, with three judges, in which the plaintiff sought an interlocutory injunction against W. H. Osborne, Jr., as tax commissioner of the State of Nebraska, and the treasurers of seventy-two counties of the state, to restrain the enforcement of taxes assessed and levied against it by the State of Nebraska through its board of equalization and assessment. The defendants, (except two) moved to dismiss (Tr. 35), and upon the application for an interlocutory order objected to jurisdiction on the ground that the plaintiff had a plain, adequate and complete remedy at law, for its protection against the alleged wrongs charged in the petition, by means of an error proceeding from the state board of equalization and assessment to the Supreme Court of the State of Nebraska.

Insufficiency of fact to constitute a valid cause of action was also stated in the motion.

All defendants are now represented by the attorney general.

The respective parties produced their evidence. The court entered the following order (Tr. 47):

> "Now on this 10th day of January, A. D., 1923, this cause having heretofore been taken under advisement by the court on plaintiff's application for a temporary injunction the court being well advised in the premises, doth find;
>
> "That plaintiff for the redress of the wrongs recited in its petition had an adequate remedy at law under the statutes of the state of Nebraska in prosecuting error proceedings to the Supreme Court of the State of Nebraska, and for that reason there is no equity in the application for a temporary injunction.
>
> "It is therefore considered by the court that plaintiff's application for temporary injunction be and hereby is denied.
>
> "To all and singular the findings and judgment of

the court plaintiff excepts and its exceptions are hereby allowed. By the court: Robt. E. Lewis, Circuit Judge. Thos. C. Munger, District Judge. J. W. Woodrough, District Judge."

Thereafter the plaintiff moved for a re-hearing (Tr. 47), which was denied (Tr. 48).

Diversity of citizenship is alleged, the amount in controversy is more than $3000 as to each defendant, except seven. In seven counties the amount of taxes involved is less than that sum (Tr. 73, 74). The gravamen of the complaint is that appellant's property was intentionally and wrongfully over-assessed (Tr. 29), while other property was intentionally and wrongfully under-assessed (Tr. 27, 28). The defendants insisted throughout the hearing that there was a plain adequate and complete remedy at law by way of an error proceeding from the state board of equalization and assessment to the Supreme Court of Nebraska; that there be being such a remedy the Federal courts, under the principles of equity administered by such courts, would decline jurisdiction; that the Federal courts would not act until the procedure provided by the laws of the state had been followed to a conclusion.

A full hearing was had before the State Board of Equalization and Assessment (Tr. 106-142) on the complaint of appellant against its assessment for 1922. The complaint was dismissed August 2, 1922 (Tr. 142). The petition in equity was filed November 22, 1922 (Tr. 4). No error proceeding to the Supreme Court of Nebraska was prosecuted.

BRIEF OF ARGUMENT.

I. Method of Taxation of Railroad Properties in Nebraska.

Property generally in Nebraska is assessed by precinct assessors under the direction of county assessors. Railroad property is assessed by the state board of equalization and assessment. The method of assessing railroad property is governed principally by these sections of the compiled statutes of Nebraska, for 1922: 5898, 5820, 5904, 5905, 5839, 5840, 5841, 5842, 5844, 5847, 5848, 5849, 5850, 5901, 6010 and 6017.

Other sections cover other phases of the subject not material to this case. (All references herein are to the compiled statutes of Nebraska for 1922).

The sections named are as follows:

> 5898. The Governor, Secretary of State, State Auditor, State Treasurer and Tax Commissioner are hereby constituted the State Board of Equalization and Assessment. The Tax Commissioner shall be secretary of said board, and as such perform such duties as may devolve on him by law or the rules and regulations of the board. He shall have authority to administer oaths and affirmations and to call special meetings of the board at such times as its business may require.
>
> 5820. All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. "Actual value," as used in this Act, shall mean its value in the market in the ordinary course of trade.
>
> 5904. The State Board shall determine the amount of all taxes required for state purpose, and the rate of taxation upon all tangible property in the state necessary to raise the same, and make a levy of such taxes throughout the state. The rate of the general state tax on tangible property together with the state tax on

intangible property shall be sufficient to realize the amount necessary to meet appropriations made by the legislature for the year in which the tax is levied, and an additional sum not exceeding twenty per cent of the amount of any existing state indebtedness.

5905. On or before the second day of August in each year the State Board shall transmit to the county clerk of each county a statement of the rate of taxation required for the general state tax, the state school tax and any other general or special taxes, as directed to be levied and collected by the State Board.

5839. The State Board of Equalization and Assessment is hereby empowered, and it is made its duty, to assess all property of the railroads and railroad corporations in the State of Nebraska; Provided, however, that all machine repair shops, general office buildings, store houses, and also all real and personal property outside of right-of-way and depot grounds, as of and belonging to any such railroad and telegraph companies, shall be listed for purposes of taxation by the principal officers or agents of such companies with the assessors of any precinct of the county where such real or personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property.

5840. The Board on the first Monday of May of each year shall proceed to ascertain all property of any railroad company, owning, operating or controlling any railroad or railroad service in this state, which for the purpose of assessment and taxation, shall be held to include the main track, side track, spur tracks, warehouse tracks, roadbed, right-of-way and depot grounds, and all water and fuel stations, buildings and superstructures thereon, and all machinery, rolling-stock, telegraph lines and instruments connected therewith, all material on hand and supplies provided for operating and carrying on the business of such road, in whole or in part, together with franchises and all other property of such railroad company used or held for the

purpose of operating its road, and appraise and assess the same as personal property as herein provided.

5841. On or before the fifteenth day of April in each year, the person, company or corporation owning, operating or controlling any railroad or railroad service in this state, shall, by its president, secretary or principal accounting officer, return to the State Board of Equalization and Assessment a sworn statement or schedule of the property of such company on the thirty-first day of March preceding, as follows:

(1) Of the right-of-way, track and roadbed, giving the entire length of the main track in this and other states, and showing as to this state the portion in each governmental subdivision;

(2) The length of each side or second track and turn-out, spur and warehouse track and aggregate length of such side or second track, turn-out, spur and warehouse tracks, together with the name of the governmental subdivision in which such side or second track and turn-outs, spur and warehouse tracks are located;

(3) A complete list giving size, location as to governmental subdivision, material and value of all depots, station houses, machine shops, stockyards, scales or other buildings situated wholly or in part on the right-of-way, together with all platforms, fuel and water stations, and the machinery and tanks connected therewith.

(4) Showing the number of ties in track per mile, the weight of iron or steel rails per yard, used in the main or side track; what joints or chairs are used in track, kind of ballasting; length of time iron or steel has been used, and what length of time the road has been built;

(5) A full list of the rolling stock belonging to or operated by such road, which shall distinctly set forth the number, class and value of all locomotives, passenger cars, dining cars, express cars, mail cars, baggage cars, grain cars, box cars, horse cars, cattle cars, coal cars, flat cars, wrecking cars, pay cars and all other kinds

of cars owned or used by such company, whether within or without the State of Nebraska, together with a statement of the number of miles traveled by each of the classes of cars over the line of such company within the State of Nebraska and without the State of Nebraska, separately, during the year preceding the first day of January last past;

(6) A statement or schedule showing: (1) The amount of capital stock authorized, and the number of shares into which said capital stock is divided; (2) The amount of capital stock paid up; (3) The market value of such stock, or if of no market value, then the true value of the shares of stock; (4) The total amount of all secured and unsecured indebtedness, except for current expenses of operating the road; (5) The location and actual valuation of all its real estate and personal property in this state that is locally assessed. Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the State Board of Equalization and Assessment, which values shall be taken into account and be considered in arriving at the true value of such railroad property and its franchises;

(7) A correct return of the value of all tools and materials used for repairs, and of all other personal property in the State of Nebraska, together with such other information as the State Board of Equalization and Assessment may require in order to enable them to apportion such rolling stock between the main line and branches of the road;

(8) A true statement of all bridges, showing where located as to governmental subdivisions, the true value thereof, kind and material, the length, width and height of such structure;

(9) The total gross earnings and net earnings of said corporation during the year for which said statement is made, and the total amount expended in the operation and maintenance of the property and the improvements thereof, distinguishing that expended in improvement or betterment from that expended in maintenance and operation; also the dividend last declared

upon its shares and the amount thereof, and the date, number and the amount of all dividends declared upon its stock during the year next preceding the date of such report, and such other information as the State Board may in writing require, all of which shall be taken into consideration in ascertaining and fixing the value of such road and the franchise thereof, together with such other information as the State Board may require in relation thereto.

5842. The returns of railroad companies or corporations shall not be held to be conclusive as to the value of the property, but the State Board of Equalization and Assessment shall, from all the information which it is able to obtain, including records of the Railway Commission or other regulatory body, find the true value of all such property, including tangible property and franchises, and shall assess the same on the same basis as other property is hereby required to be assessed. The valuation of each mile shall be determined by dividing the whole value by the number of miles of the main track of each road or line.

5844. Any railroad company operating any road within the State of Nebraska shall annually, on or before the first day of April, report to the County Clerk of each county through which its line of road runs the number of miles of main track situated within each governmental subdivision in the county, together with all machine and repair shops, general office buildings, store houses, and all real and personal property not on the right-of-way.

5847. The State Board of Equalization and Assessment, after having valued and assessed all the railroad property in this state in accordance with the provisions of this article, shall immediately make return to the County Clerk of each and every county in which any portion of the railroad property as designated in this article may be located, to be used as the basis of levy for the county and governmental subdivisions through which any railroad or part thereof may extend.

5848. Such return shall include the following:

(1) Number of miles of track of each railroad located in each governmental subdivision in the county, and the total length of such road in the county;

(2) The average valuation per mile of such road;

(3) The valuations that shall be placed to the credit of such governmental subdivision in the county.

5849. The State Board shall transmit to each county, as soon as practicable after receiving returns from the railroad company, a statement from such returns showing as to each county and railroad all machine and repair shops, general office buildings, store houses, and also all real and personal property outside of such railroad right-of-way, and depot grounds, not included in the property herein required to be assessed by the State Board of Equalization and Assessment, and in what governmental subdivision located, which return shall be for the benefit of the county board and local assessors.

5850. Railroad property assessed by the State Board shall be apportioned by the County Clerk among the respective governmental subdivisions in which the same may be entered on the tax list and collected by the County Treasurer.

5901. The State Board of Equalization and Assessment shall, on the first Monday of July of each year, meet at the state capitol for the purpose of equalizing assessments. They shall proceed to examine the abstracts of property assessed for taxation in the several counties of the state, including the railroads entirely within such county, and all other property, and shall equalize such assessments so as to make the same conform to law, and for that purpose they shall have the power to increase or decrease the assessed valuation of any county or tax district, and such increase or decrease shall be made by a percentum, and the per cent of increase or decrease when made shall be certified to the county clerk of the proper county, who shall thereupon add to or deduct from the assessment of each piece or parcel of property in the county affected an amount equal to the per cent of increase or decrease

fixed by the State Board. The State Board shall have the power, in equalizing assessments, to increase or decrease the assessed valuation of any class, classes or kinds of property in any county or tax district, whenever in their judgment it shall be necessary to make such assessment conform to law; and such increase or decrease, when made, shall be certified to the county clerk and by the county clerk extended upon the tax rolls as hereinbefore provided; but in the extension of valuations the county clerk shall reject all such amounts as may fall below two dollars and fifty cents, and all amounts of two dollars and fifty cents or more shall be extended as the next higher five dollars or multiple thereof, this making all valuations end in cipher or five. In the event it shall appear to the State Board of Equalization and Assessment that a just, equitable and legal assessment of the property in the state cannot be made without increasing or decreasing the valuation as returned by any county, the Board of Equalization and Assessment shall issue a notice to the counties which the Board deems either under-valued or over-valued and shall set a date for hearing at least five days following the mailing of such notice. At such hearing legal representatives of the counties may appear and show cause why the valuation or valuations of their county should not be increased or decreased by the State Board, and after a full hearing, the State Board shall enter its order and certify the same to the county clerks of the proper counties as hereinbefore set forth in this section. The notice provided for in this section shall be mailed to the county clerk, county assessor, and chairman of the county board. From any final decision of the State Board of Equalization and Assessment, any person, county or municipality affected thereby may prosecute a writ of error to the Supreme Court and upon demand therefor the State Board shall prepare and certify a transcript of its records and proceedings involved in such decision, upon payment by the party demanding the same of a fee of ten cents for each one hundred words. Notice of intention to obtain a review shall be filed within ten days from the date

of the entry by the Board, and when docketed said cause shall be given precedence by the Supreme Court over all civil cases.

6016. The county treasurer is hereby required, during the month of December of each year after the personal taxes for the year have become delinquent, to notify by mail all persons of the amount of their delinquent personal tax, and that unless the same is paid by February first next following, distress warrant will be issued therefor. The treasurer shall, on and after the first day of February next after the personal taxes for the last preceding year have become delinquent, collect the same, together with interest and costs of collection, by distress and sale of personal property belonging to the person against whom levied in the manner provided by law for the levy and sale of personal property on execution. Distress warrants shall be issued against all persons having delinquent personal tax for each year, and each such warrant shall include all delinquent personal taxes of the person against whom issued, unless such person shall, on or before February 1st, file with the treasurer an affidavit that he is unable, by reason of poverty, to pay any such tax, in which case distress warrants shall not issue until ordered by the county board.

6017. When any corporation doing business in this state shall fail or neglect to pay any tax assessed or charged against it, when the same shall have become delinquent, the county treasurer shall notify any agent or officer of the company in the county where such tax is delinquent that the same is delinquent, and the amount due, and shall further notify the officer or agent to pay over all moneys that may be in his hands, or that may afterwards come into his hands, belonging to such corporation, not exceeding the amount of tax due, to such county treasurer; and if such agent or officer shall fail to pay over the money to the county treasurer, he shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than fifty dollars, nor more than five hundred dollars.

II. Summary of Laws Relating to Taxation of Railroads.

Briefly summarized the important features of the foregoing sections of the statute may be stated thus: They provide that the state board of equalization and assessment, consisting of the governor and four other state officers, shall determine the rate of taxation that will be sufficient to realize the amount necessary to meet appropriations made by the legislature for the year in which the tax is levied, with an additional sum to apply on existing indebtedness. In order to enable the board to ascertain the value of railroad property, the railroads are required to furnish annual statements showing the kinds and amounts of property they own and showing their financial conditions. Upon the information furnished by the railroads and from other information obtained by the board it fixes the value of railroad property. If any railroad company be dissatisfied with the valuation fixed by the board of equalization and assessment, it has a plain, adequate and complete remedy by means of an error proceeding to the supreme court of the state.

Properties not immediately connected with the right-of-way and terminal property are assessed by the local assessors. Taxes on such forms of property are not involved in this suit. Appellant offered to pay all city and village taxes in full (Tr. 32).

Section 5823 provides for lien as follows:

> "Taxes assessed upon personal property shall be a first lien upon the personal property of the person to whom assessed from and after the first day of November of the year in which they are assessed, until paid."

As railroads are assessessed as personal property, the lien for taxes attaches on November 1st of the year in which assessed. Interest is charged on such taxes after December 1, as provided in section 6002, which is, in part, as follows:

"On the first day of December of the year in which taxes shall have been assessed, all unpaid personal taxes, except in cities authorized by law to levy and collect their own taxes shall become delinquent and shall draw thereafter ten per cent per annum, which interest shall be collected the same as tax so due."

Distress warrants for the collection of personal taxes are issuable by county treasurers on February 1st of the year succeeding the year in which the taxes are levied.

In the present case there is no controversy as to rate of taxation; it relates entirely to valuation of the property.

III. Valuation of Property for Taxation a Judicial Function.

On page 13 of appellant's brief, it is said:

"The valuation and assessment of appellant's property for taxation is not a judicial function; it is legislative."

The words "levy" and "assessment" are used with various meanings. They are used here with the same meanings as in the Nebraska statutes. Under paragraph 10 of article 6 of the revenue law, section 5861, the word assess is defined as follows:

"The term 'assess,' as used in this article, shall include within its meaning valuation of property for the purpose of taxation."

The term "levy," as it is used in section 5904, above quoted, refers to the amount of all taxes required for state purposes and the rate of taxation to meet the amount appropriated by the legislature. It does not refer to the making of a valuation. It is also provided, by section 5979, that after equalization has been had, county boards shall levy the necessary taxes for the current year. This is after valuation and equalization are completed. Section 5979 is, in part, as follows:

"The county board of equalization shall adjourn from time to time until the action of the state board of equalization and assessment shall have been had and certified

to the county clerk, and, on the last day of sitting as a board of equalization, the county board shall levy the necessary taxes for the current year, including all county, township, city, school district, precinct, village, road district and other taxes required by law to be certified to the county clerk and levied by the county board: Provided, any such taxes regularly voted and certified to the county clerk, after the county board shall have made such levy and before the county clerk shall have completed the tax list, shall be levied by the county clerk, if within the limit of the law, and extended upon the tax list the same as if levied by the county board."

Taxation according to value requires three processes: Listing of property, valuation of property and fixation of the rate of taxation. The processes are separate and distinct and involve different functions. In Nebraska appropriations by the legislature precede the assessment and the levy of taxes. The determination of the amount that must be raised by taxation is legislative but the actual valuation of property as a basis for the levying of taxes is judicial in its nature. It is usually said that valuing or assessing officers act quasi-judicially. Appellant has laid down a false premise in saying that valuation of property for taxation is a legislative function. Valuation is a judicial function:

Cooley on Taxation, 3d Edition, p. 751.

In *Slaughter* v. *City of Louisville*, 89 Ky. 112, its it said (121):

"It is well settled that the valuation of property, for the purpose of *ad valorem* taxation, is, in its character a judicial act."

In *State ex rel. Goff* v. *County Board of Dodge County*, 20 Neb. 595, the court said, (p. 599):

"It will thus be seen that the assessor is to fix the actual assessable value of the taxable property named in his territory. In fixing such values, he acts judicially.

Cooley on Taxation, p. 550, *et seq.*, and cases cited. His assessment, therefore, becomes final—as much so as a judgment of a court upon a subject where it has jurisdiction, unless reviewed in the mode provided by law. The assessor is required to ascertain the value of each tract of land assessed by him, not by hearsay, not by calling witnesses, but by actually viewing the land itself. The evident object of the statute is to enable the assessor to fix the true value of the land, and in the absence of any proof upon the subject the presumption is that he has done his duty.

In *Dixon County* v. *Halstead*, 23 Neb. 697, the court said (p. 701):

> "Where property has been duly assessed, the owner may rest securely upon the valuation so fixed, until a case is established authorizing an addition to the assessed valuation of such property. The assessor acts in a judicial capacity in making an assessment of property. The law presumes that he will do his duty faithfully, fearlessly, and impartially; therefore, to authorize the board of equalization to increase the assessment of an individual, a complaint must be made and testimony taken upon the same, authorizing such increase. Otherwise the board will have no power."

In *State* v. *Savage*, 65 Neb. 714, the Supreme Court of the state said (p. 770):

> "The state board of equalization, it must be admitted, is an administrative body, clothed with quasi-judicial powers in regard to the assessment of property it is by law required to value and assess. It has the right to exercise a fair discretion in expressing its judgment as to the valuation of such property; and when it has once acted, and there is no fraud shown, its judgment cannot be controlled by the writ of mandamus."

In *State* v. *State Board of Equalization and Assessment*, 81 Neb. 139, the language in *State* v. *Savage*, *supra*, that the

state board of equalization and assessment is clothed with quasi-judicial powers as to the valuation of railway property, was quoted approvingly (143).

In *Hacker* v. *Howe*, 72 Neb. 385, the court said (p. 393):

> "The actions not only of the county assessor in fixing the valuation in the first instance, but also that of the county board of equalization and of the state board of equalization in equalizing as between different counties, are in their nature quasi judicial."

The court also recognized the doctrine laid down in *State* v. *Savage, supra,* that in assessing property the state board of equalization is clothed with quasi judicial powers.

In *Hagar* v. *Reclamation District*, 111 U. S. 701, this court considered the functions of assessing property and said (710):

> "But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially; and in most of the states provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments."

IV. The Action of the Board in Assessing Railroad Property is a Final Order.

In *Sioux City & Pacific R. Co.* v. *Washington County*, 3 Neb. 30, it was held that the action of the county board in raising the assessment of plaintiff's property was a final order.

In *State* v. *State Board of Equalization and Assessment, supra,* it is said (p. 143):

"We also find that we have uniformly held that the action of a taxing board is in its nature a final order, which cannot be attacked collaterally, and can only be reviewed on error or appeal."

V. Valuation, Not Levy, Reviewable.

In *Chapel* v. *Franklin County*, 58 Neb. 544, an action to recover taxes paid under protest alleged to have been based on an excessive assessment, the court said (p. 545-6):

"It also shows that Chapel, being dissatisfied with the action of the town board, presented his grievance to the county board of equalization, where a hearing was had and an order made reducing the assessment from $1,718 to $1,546. This order, never having been reversed, vacated, or modified, fixed conclusively the value of plaintiff's personal estate for the purposes of taxation. Being a judicial order, it might have been reviewed in the district court, but it is not subject to collateral attack."

In *McGee* v. *State*, 32 Neb. 149, it is paid (p. 153):

"The town board in correcting assessments, acts judicially, which action is final and conclusive, unless corrected in the manner provided by law."

In *Whedon* v. *Lancaster County*, 76 Neb. 761, a resident taxpayer appealed from the order of the county board levying taxes on the ground that the taxes were excessive, extravagant, exorbitant, and illegal. The District Court sustained a demurrer to the petition and the Supreme Court of Nebraska affirmed the decision. The court said (p. 763):

"A careful examination of our present revenue law discloses that it contains no provision for an appeal from the order of the county board in making the tax levy. We therefore conclude that it was not the in-

tention of the legislature to allow a taxpayer to appeal from such order.

"An assessment means the determination of the value of a man's property for the purpose of levying a tax; and official listing of persons and property with an estimate of the value of the property of each for purposes of taxation. 3 Cyc. 1111.

"This clearly distinguishes the act of assessment from the order constituting the tax levy. A proper and legal assessment must first be made, and the value of the taxable property of the county must be thus ascertained as a basis for the subsequent act of levying sufficient taxes to conduct the governmental affairs of the state, the county and its several municipalities. So, the statute providing for an appeal from the decision of the board of equalization in certain matters of assessment can have no application whatever to the subsequent action of the county board by which the tax is levied."

"* * * Again, it would seem clear that the legislature never intended to confer jurisdiction upon the courts by appeal to review or control the discretion of the county board in the matter of levying taxes. To grant the district court such powers would, in effect, substitute its discretion for that of the county board, the tribunal to which the statute has specifically committed that duty. So, we are of opinion that the right of appeal to the district court from an order of the county board in making the necessary tax levy under the provisions of Section 137, Art. I, Ch. 77, Comp. St. 1903, does not exist, and therefore that court was without jurisdiction to hear and determine the matters set forth in the appellant's petition."

McCague Inv. Co. v. *Metropolitan W. D.*, 101 Neb. 820.

Beadle v. *Sanders*, 104 Neb. 427, approves the Whedon case.

The case of *Hutchinson, et al.* v. *City of Omaha*, 52 Neb. 345, cited by appellant, was an action in injunction to pre-

vent the collection of local assessments for special improvements by grading certain streets. The court found that the legal proceedings for the improvements were wholly defective, in that there were not sufficient petitioners, the grade was not properly established, there was an improper change of grade and some streets described in the petition were not graded. It said (p. 348):

> "We think this tax was in its inception, in its groundwork, and throughout, absolutely void."

The court held that although the city had the power to perform the work and assess one-half the cost against the plaintiffs it could not require as a condition of relief that they should be adjudged to pay such half. The court declined to act as the assessing agency as that was the duty of the city authorities. It is apparent that the court did not mean that the valuation of property was not a judicial act. The later cases cited above do not refer to *Hutchinson* v. *City of Omaha*, so it is clear that the court does not consider that it has said anything contrary to the course of its holdings, that valuation is a judicial function.

It is not the position of appellees, as seems to be assumed in the brief of appellant, that the Supreme Court of Nebraska has legislative power in matters of taxation, or that it will re-assess the properties of railroad companies. As hereinafter explained, its functions are to determine petitions in error and if it find the decision of the board to be manifestly wrong it will reverse such decision and remand the matter to the board for further proceeding.

Chicago, Rock Island & Pacific Ry. Co. v. *State*, (unreported, decided by Nebraska Supreme Court December 31, 1923). The opinion is reprinted as an appendix to this brief.

Appellant says (Brief, p. 14) that although the board may proceed in a quasi judicial capacity the orders it enters are not judicial. The appellant, it seems, does not correctly apprehend the functions of the board. The board has no discretionary power (except as noted below) as to the amount of money to be raised. It computes the amount from the legislative acts and then simply performs the arithmetical operation of finding what the necessary rate will be. Its only discretionary function in making the levy is as to the amount that will be raised to apply on existing indebtedness. No question involving that power is before the court. The controversy here relates purely to the judicial function involved in valuing appellant's property. Under the statute above quoted (Sec. 5901) an error proceeding may be prosecuted to the Supreme Court from a finding of value.

VI. The Remedy by Writ of Error is Plain, Adequate and Complete.

Attention should be called to the cases decided prior to the case of *The Chicago, Rock Island & Pacific Railway Co.* v. *State, supra*, just decided by the Supreme Court of Nebraska, and to some of the constitutional provisions and certain statutes.

The constitution of Nebraska provides, article 1, section 24,

> "The right to be heard in all civil cases in the court of last resort, by appeal, error or otherwise, shall not be denied."

Section 9127 of the statutes provides:

> "A judgment rendered, or final order made, by a county court, justice of the peace or any other tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court."

Section 9128 provides:

"An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a 'final order' which may be vacated, modified or reversed, as provided in this chapter and chapter 19."

Section 9129 provides in part as follows:

"The proceedings to obtain such reversal, vacation or modification, shall be by petition entitled 'petition in error', filed in a court having power to make such reversal, vacation or modification, setting forth the errors complained of, and thereupon a summons shall issue and be served, or publication made, as in the commencement of an action."

Section 9131 provides:

"The plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated or modified. No written or printed abstract or any copy of an abstract of the record shall be required in any case in the supreme court of this state."

Section 9132 provides:

"Judges of county courts, justices of the peace and other judicial tribunals having no clerk, and clerks of every court of record, shall, upon request and being paid the lawful fees therefor, furnish an authenticated transcript of the proceedings, containing the judgment or final order of said courts, to either of the parties to the same, or to any person interested in procuring such transcript."

In *Sioux City & Pacific R. Co.* v. *Washington County*, 3 Neb. 30, two cases were determined, the first being an appeal from the decision of the board of county commissioners in

overruling the petition and motion of the railroad to set aside the action of the board increasing its assessment, the county board being then the assessing authority and the other a petition in error to the proceedings of said board covering the same assessment. The district court dismissed the appeal for want of jurisdiction and the petition in error was overruled, judgment being rendered sustaining the board of equalization. Petitions in error were filed in both cases in the Supreme Court. The judgment of the district court in the appeal was affirmed on the ground that an appeal from the decision of the board did not lie, that the decision of the county board was a final order and as such might be reviewed in the district court only upon petition in error. In the error proceeding the Supreme Court held that the county board had no right to increase an assesment without notice to the persons whose rights and interests are affected. The judgment of the district court was, therefore, reversed and the proceedings of the county commissioners vacated and set aside. Thus, full relief was granted to the petitioner in error. In the case of *McGee* v. *State*, 32 Neb. 149, *Sioux City & Pacific R. Co.* v. *Washington County*, *supra*, was approved.

In *State* v. *State Board of Equalization & Assessment*, 81 Neb. 139, which was an original application on the relation of the Union Pacific Railroad Company for a writ of mandamus to compel respondents as a state board of equalization and assessment to convene and make certain records, the court said (pp. 143-144):

> "It is insisted by the respondents, however, that neither appeal nor error will lie from the final action of the board in valuing and assessing railroad property for taxation. We can readily agree with the first part of this contention, for appeal is purely a statutory remedy, and where no provision therefor is made by law the right to pursue that remedy does not exist; but when

we come to consider the question of the relator's right to prosecute error to a court of competent jurisdiction an entirely different rule prevails. By section 580 of the code it is provided 'A judgment rendered, or final order made, by a probate court, justice of the peace, or any other tribunal, board, or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court.' It is further provided by sec. 581 of the code: 'An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title.'"

Section 580 referred to is the same as section 9127, Compiled Statutes of Nebraska for 1922, quoted above, except that the word "county" is now used. County courts are courts of probate in Nebraska and were formerly so designated.

Formerly there was no statute providing specifically for an error proceeding from the board of equalization and assessment. In 1921 the revenue law was modified and the following provision was added (part of Section 5901):

"From any final decision of the state board of equalization and assessment, any person, county or municipality affected thereby may prosecute a writ of error to the supreme court and upon demand therefor the state board shall prepare and certify a transcript of its records and proceedings involved in such decision, upon payment by the party demanding the same of a fee of ten cents for each one hundred words. Notice of intention to obtain a review shall be filed within ten days from the date of the entry by the board, and when docketed said cause shall be given precedence by the supreme court over all civil cases."

This amendment was considered by the Supreme Court of Nebraska in the case of *The Chicago, Rock Island & Pacific Railway Co.* v. *State, cited supra.* The railway company objected to its 1923 assessment before the board of equalization and assessment. In conjunction with some of the other railroads operating in Nebraska it offered testimony and presented its arguments. This was in accordance with the practice before the state board for a number of years. It offered in evidence the record of the proceedings of the board in 1921 and 1922 (offered in this case as Exhibit 29, transcript pp. 106-140). On error to the Supreme Court it was reversed and remanded.

Under the decision in the Rock Island case it will be seen that there is a plain, adequate and complete remedy at law and that the appellant had no need of resorting to a proceeding in equity to sustain any of its rights. The essential parts of the decision are as follows:

> "This is a proceeding in error under section 5901, Comp. St. 1922, to review the assessment for taxation made by the state board of equalization and assessment of that part of its property and franchises required by law to be assessed by that body. The complainant alleged in its petition for a hearing before the state board that all property in the state other than railroad property has been valued for assessment purposes by the county authorities at not to exceed 50 per cent. of its actual value; that the law provides that the property of complainant be also valued on the same basis as used for the valuation of all other classes of property; that if the tentative assessed valuation of its property be not reduced to the same percentage of actual value as other property, or unless all other property be valued and assessed by increasing the value to the percentage at which the complainant's property has been assessed, complainant would be denied the equal protection of the law, and its property would be taken for public use without just compensation and without

due process of law. It alleges that the tentative assessment of $10,694,409, made on June 15, 1923, is in excess of the actual value of the complainant's property, which does not exceed $5,186,920, and that this valuation should be further equalized with the assessment of other property in the state. The complainant requested that the board either reduce the valuation of its property to the same percentage of actual value as other property, or that it increase the valuation of all classes of property in each county to the same percentage at which the complainant's property has been assessed. Other railroad companies filed similar complaints. A hearing was had and at its conclusion the board adhered to the tentative valuation.

"There was no assessment of real estate required under the statute in 1923. The 1922 assessment remains except for improvements placed upon the land within the tax year of 1922-1923.

(Extensive discussion of the testimony follows).

"If, however, as between two classes of taxpayers, the property of each is assessed at a lower value but at the same proportion of its actual value, there is no ground for complaint on the part of either. But if the property of one is valued at its actual value and that of another at only 68 per cent of its actual value, inequality results and an unjust and unlawful exaction is made. *State* v. *Osborn*, 60 Neb. 415.

"A number of decisions have been cited as to what elements should govern in the valuation of railroad property. There seems to be some conflict as to the proper rule to be adopted, especially with regard to valuation for rate making purposes. We believe, that, in reviewing the action of the board, we must consider only those elements of value, the existence of which rests upon the facts in evidence. We may not act upon mere conjecture or theory, which, though the theory may be sound, can only be apprehended by an explanation made by some witness conversant with the intricacies of railroad accounting. No such explanation

was made. The following methods of valuation are presented by the record. They do not possess all the elements or factors generally required by the courts, but they are all that were before the state board, and, since we are merely reviewing their action, we cannot consider any others.

"From a careful consideration of all the facts in evidence, we are of the opinion that the valuation of the property of complainant lacks reasonable uniformity with the assessment of lands and improvements; that, as the record recites, the railroad property has been assessed at 'full actual value,' and that the other class mentioned has been assessed at a much lower percentage. This being the case, the property of complainant should be revalued as nearly as possible at the same percentage of actual value as all other property.

"Having come to this conclusion, the finding and order of the state board of equalization and assessment of the value of complainant's property is set aside and the proceedings are remanded to that body for further proceeding in accordance with law. While section 5882, Comp. St. 1922, seems to apply specifically to where 'any tax or part thereof levied under the provisions of this article shall be adjudged illegal and nonenforceable, or shall be set aside by any court of competent jurisdiction on any ground whatever,' and specifies what the duty of the board shall be as to reassessing and redetermining the value in such case, the procedure prescribed for such cases seems to be well adapted to such a case as this, where the assessment of the property of the complainant has been decided to lack uniformity with that of other classes of property. We desire in this connection to call special attention to section 5842, Comp. St. 1922, which gives the board power to consider all facts and information not contained in the reports made by the railroad companies. Where such information is considered, the source from which it has been obtained should, so far as possible, be mentioned in the record, so that a reviewing court may consult the same sources and thus stand in the shoes of the assessing body."

The section of the statute 5882, referred to in the decision of the Supreme Court of Nebraska (under Art. 6 relating to equalization by local boards) is as follows:

> "If any tax or part thereof levied under the provisions of this article shall be adjudged illegal and nonenforceable, or shall be set aside by any court of competent jurisdiction on any ground whatever, it shall be the duty of the board, whether any part of the taxes assessed and levied have been paid or not, to forthwith reascertain and redetermine the value of the property of such company or companies, if the same shall be called for by such decision of the court; and, when such reassessment has been made, to make duplicates of the original assessment rolls with their valuations thereon, and return the same to the respective officers of the cities and counties as provided in the fifth next preceding section. Whereupon it shall be the duty of the city and county officers, respectively, to make a new computation and extend new levies of taxes against the company or companies affected by the order of the court, which taxes shall be of the same force and effect as an original assessment and levy made in accordance with law. The proceedings for such reassessment and for the extension and collection of taxes upon such duplicate assessment rolls shall be conducted in the method originally provided, as near as may be. The power is hereby given to reassess the property of any company as often as may be necessary until the amount of taxes legally and justly due from any company for any year have been finally and definitely determined under the provisions of this article. In case relevies shall be made, credit may be given thereon of any amounts paid upon the prior levy."

Thus not only is there a remedy in the Supreme Court for the aggrieved taxpayer, but the procedure to be followed after the Supreme Court has acted is also directed by the decision.

The Rock Island case disposes of the necessity of discussing the effect of *Lincoln Telephone & Telegraph Co.* v. *Johnson County*, 102 Neb. 254, and *Sioux City Bridge Co.* v. *Dakota*

County, 105 Neb. 834. The decision in the Rock Island case is in absolute harmony with the holding of this court in *Sioux City Bridge Co.* v. *Dakota County*, Advance Opinions (L. Ed. No. 7, p. 220, decided January 2, 1923. (It should be noted that the decision in the case of *Sioux City Bridge Co.* v. *Dakota County, supra*, was rendered on January 2, 1923, whereas the order dismissing plaintiff's bill was not entered until January 10, 1923.) The court directs the board, upon reassessment, to make its record so that the reviewing court may consult the same sources and thus stand in the shoes of the assessing body.

The decision in the Rock Island case disposes of the contentions of appellant in *Chicago & North Western R. R. Co.* v. *City of Albion*, 192 N. W. (Neb.) 233. In that case, which involved an assessment for special benefits, the railroad company appeared long after the proceeding had been instituted and after the testimony, on which the assessment was based, had been offered. The court states the facts as follows (p. 233):

> "The record shows that a notice was published to all property owners in the districts that the city council would sit in special session on October 21, 1918, at 8 o'clock p. m. for the purpose of fixing the valuation of the lots within paving districts Nos. 1, 2 and 3, and for the purpose of equalizing and distributing the costs of the improvement upon the property benefited 'according to law and the benefits derived therefrom.' The council met, took up the matter, and adjourned until October 24, 1919. A number of adjourned meetings were held, and finally on November 12, 1919, 'after arriving at a tentative agreement as to values and benefits, the clerk was instructed to embody the same in a schedule for further consideration at a future meeting.' An adjournment was taken to November 14. At that meeting the Chicago & Northwestern Railway Company appeared and requested the privilege of offering testimony in regard to the assessment of paving taxes on their property, and

further asked the board to introduce the evidence upon which it based its findings in fixing the assessment, so that it might be preserved in a bill of exceptions. The council permitted the railway company to present whatever testimony it desired, but the request that the evidence leading to the findings of the board be incorporated in a bill of exceptions was refused."

Testimony offered by the company was received and the board then fixed the assessment. The court held that the board must be considered to have acted as appraiser of the benefits, acting upon information and upon their own knowledge of the property, and that the fact that the record did not set forth the evidence upon which the board acted would not render the assessment erroneous. The decision shows no reason for the long delay on the part of the railroad company, and it would certainly be more than could be expected to have the board retrace all of its steps and show on what evidence it acted. A litigant, who remains out of court until the trial of his case is nearly concluded, should not expect the court to retry the case for his benefit.

VII. The Jurisdiction of the Federal Court.

It is fundamental, of course, that if there is jurisdiction in the federal equity courts the law of a state cannot defeat such jurisdiction. The question here is whether or not, there being an adequate remedy under the state statutes, a Federal equity court, as controlled by the Federal law, has jurisdiction. We cite some of the cases decided by this court holding that wherever there is an adequate remedy at law, provided by the state statutes, Federal equity jurisdiction will not be exercised to restrain the collection of state taxes.

Dows v. *City of Chicago*, 11 Wall. 108 was a suit in the Circuit Court of the United States for the northern district of Illinois, carried on appeal to the Supreme Court of the United States. The court said (pp. 109-110):

"According to the view we take of this case, it is unnecessary to consider the force of any of the objections urged by the appellants to the decrees rendered. Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.

"No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked."

In *Hannewinkle* v. *Georgetown*, 15 Wall. 547, *Dows* v. *Chicago* was affirmed. The case of *Mooers* v. *Smedley*, 6 Johnson's Chancery Reports 28, was approvingly cited by the court.

Mooers v. *Smedley*, *supra*, was a suit in injunction to prevent the payment of certain bounties. Chancellor Kent said (pp. 30-31):

"The act which has been cited (Laws N. Y. vol. 2, p. 137) gave the supervisors authority 'to examine, settle, and allow all accounts chargeable against the county, and to ascertain each town's proportion, and to add such further sum as any town should have voted to be raised for the destruction of noxious animals, and to cause all such sums to be raised and levied.' This power implied, and required the exercise of sound judgment, and the review and correction of all errors, mistakes, and abuses in the exercise of the powers of subordinate public jurisdictions, and in the official acts of public officers, belongs to the Supreme Court. In my opinion, it belongs exclusively to that court. It has, always, been a matter of legal, and never a matter of equitable, cognizance. This is not the case of a private trust, but the official act of a political body; and in the whole history of the English Court of Chancery, there is no instance of the assertion of such a jurisdiction as is now contended for. The superintending control, in these cases, has always been exercised in the Court of K. B., and nowhere else, and that court has proceeded by certiorari, mandamus, prohibition, information, etc. I have only to regret, that I cannot afford a remedy to the party aggrieved; but I am clearly of opinion, that I cannot uphold the injunction, and the motion must, consequently, be granted."

State Railroad Tax Cases, 92 U. S. 575, was an appeal from a decision granting an injunction against the collection of taxes, the decision was reversed and in speaking of the refusal of federal courts to interfere where there is an adequate remedy at law this court, speaking by Justice Miller, said (pp. 612-614):

"Let us suppose that the complaints made in these cases against the taxes were well founded; that the mode adopted by the board of equalization to ascertain the value of the franchise and capital stock is not the best mode; that it produces unequal and unjust results in some cases; that the same is true of the mode of ascertaining the basis of assessment for the taxation by municipalities; that the board of equalization increased

the entire assessment on each company without sufficient evidence; in short, let us suppose that in these and many other respects the proceedings were faulty and illegal,—does it follow that in every such case a court of equity will restrain the collection of the tax by injunction, or will enjoin the collection of the whole tax when it is obvious that in justice a large part of it should be paid, and if not paid, that the complainant escapes taxation altogether?

"We propose to consider these questions for a moment, because the immense weight of taxation rendered necessary by the debts of the United States, of the several states, and of the counties, cities, and towns, has resulted very naturally in a resort to every possible expedient to evade its force.

"It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularity, of themselves, give the right to an injunction in a court of equity. *Moores* v. *Smedley*, 6 Johns. Ch. 27; *Dodd* v. *Hartford*, 26 Conn. 239; *Green* v. *Munford*, 5 R. I. 478; *Messert* v. *Supervisors of Columbia*, 50 Barb. 190; *Dow* v. *Chicago*, 11 Wall. 108; *Hannewinkle* v. *Georgetown*, 15 Wall. 548.

"The government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid.

"That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1867, that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' Rev. Stat. Sec. 3224. And though this was intended to apply alone to taxes levied by the United States, it shows the sense of congress of the evils

to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice. See *Cheatham* v. *Norvell*, decided at this term; *Nickoll* v. *United States*, 7 Wall. 122; *Dow* v. *Chicago*, 11 Wall. 108.

"In this latter case, this court, after commenting upon the necessary reliance of the state governments upon the prompt collection of the taxes for their support and maintenance, and the ill consequences of interference with their proceedings in that matter, says, 'No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, when the property is real estate, throw a cloud upon the title of complainant before the aid of a court of equity can be invoked.' So, in the case of *Hannewinkle* v. *Georgetown*, the court says, 'It has been the settled law of this country for a great many years, that an injunction bill to restrain the collection of a tax on the sole ground of the illegality of the tax cannot be maintained. There must be an allegation of fraud, that it creates a cloud upon the title, that there is apprehension of a multiplicity of suits, or some cause presenting a case of equity jurisdiction.' 15 Wall. 548. We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say, that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of

the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax."

In *Pittsburgh etc. Ry. v. Board of Public Works of West Virginia,* 172 U. S. 32, the Pittsburg etc. Railway, an Ohio corporation, owning and operating a railway running through the state of West Virginia and other states, and owning and using a bridge across the Ohio river, filed its bill in equity in the Federal Circuit Court, District of West Virginia, against the board of public works of the state of West Virginia and its members and against a local sheriff to restrain the assessment and collection of taxes upon the bridge under Section 67, Chap. 29 of the Code of that state. The bill alleged that by that section of the Code, plaintiff was required to make return in writing, under oath, to the auditor of state, each year, of its property subject to taxation in the state. The auditor was required to present the return to the board of public works which was authorized either to approve the return or to proceed to assess the fair cash value of all property of the railroad company which it was so required to return for taxation. And it was further provided that as soon as possible after the value of any railroad property was fixed for purpose of taxation by one of the several methods designated by that section, the auditor should assess and charge such property with the taxes properly chargeable thereon.

The bill also described a portion of the location of the railway; that the bridge across the Ohio was a part of its railway, giving measurements; that the plaintiff had made the return as required by law.

The bill also alleged that the board of public works refused to approve plaintiff's return, and proceeded to asse the plaintiff with certain main track and certain second

track, which assessment and valuation covered the entire line of its railroad in the state of West Virginia, including so much of the bridge as lay within the state; and in addition thereto valued and assessed the bridge as a separate structure at the sum of $200,000, placing the tax thereon at $3060, thereby assessing the plaintiff with the entire length of the bridge in West Virginia as a part of its railway in the state and also assessing it with the bridge as a separate structure, thus taxing the plaintiff a second time for that part of its bridge which lay in West Virginia; whereas, the bridge should only have been assessed as so many feet of the railway. The plaintiff also alleged facts concerning lack of notice to the plaintiff of the assessment; payment of a portion of its tax and a refusal to pay the $3060, that thereafter the auditor added 10% to that sum to pay the expense of collection and certified the same to the sheriff for collection; that the sheriff was threatening to collect the same by legal process and thus would inflict irreparable injury upon plaintiff unless enjoined.

The plaintiff alleged that the property was used in conducting inter-state commerce, that the tax was illegal and unjust and constituted a cloud upon the title to the property, and prayed for an injunction to prevent collection. The bill was dismissed on demurrer. The decision was affirmed because the plaintiff had not availed itself of the adequate remedies provided by the statute of the state.

In its decision this court said (37):

> "The collection of taxes assessed under the authority of a State is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction. *Dows* v. *Chi-*

cago, 11 Wall. 108; *Hannewinkle* v. *Georgetown*, 15 Wall, 547; *State Railroad Tax cases*, 92 U. S. 575; *Union Pacific Railway* v. *Cheyenne*, 113 U. S. 516; *Milwaukee* v. *Koeffler*, 116 U. S. 219; *Shelton* v. *Platt*, 139 U. S. 591."

After discussing the cases cited, the court continued (44):

"The same section further provides that the decision made by the board of public works shall be final, unless the railroad company, within thirty days after such decision comes to its knowledge, appeals (which it is expressly authorized by the statute to do) from the decision as to the assessment and valuation made in each county through which the railroad runs, to the circuit court of that county. The appeal is to have precedence over all other cases, and is to be tried as soon as possible after it is entered. That court, on such appeal, is to hear all legal evidence offered by the appellant, or by the state, county, district or municipal corporation, and if satisfied that the valuation as fixed by the board of public works is correct, to confirm the same; but, if satisfied that such valuation is too high or too low, to correct it, and to ascertain and fix the true value of the property according to the facts proved, and certify such value to the auditor.

"This provision for a review and correction, by the circuit court of the county, of the assessment made by the board of public works affords a convenient and adequate remedy for any error in the taxation, and has been held by the highest court of the State to be in accordance with its constitution. (Citing case).

"That court has often had occasion to inquire how far the action of the circuit court of the county, in this respect, is administrative only, and how far it may be considered as judicial in its nature. (Citing cases).

"But it is not important, in this case, to pursue that course of inquiry; since, in matters of taxation, it is sufficient that the party assessed should have an opportunity to be heard, either before a judicial tribunal,

or before a board of assessment, at some stage of the proceedings."

Shelton v. *Platt*, 139 U. S. 591, was an action to enjoin the collection of a license tax upon an express company under a statute of the state of Tennessee. The circuit court granted an injunction but the case was reversed in this court, which said (594):

> "It was ruled in *Dows* v. *Chicago*, 11 Wall. 108, 112, that a suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal, but that there must exist, in addition, special circumstances bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant. And Mr. Justice Field, speaking for the court, said: 'The equitable powers of the court can only be invoked by the presentation of a case of equitable cognizance. There can be no such case, at least in the Federal courts, where there is a plain and adequate remedy at law. And except where the special circumstances which we have mentioned exist, the party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action. We see no ground for the interposition of a court of equity which would not equally justify such interference in any case of threatened invasion of real or personal property.'"

In *Allen* v. *Pullman's Palace Car Co.* 139 U. S. 658, suit was instituted in the Circuit Court of the United States for the Middle District of Tennessee against the comptroller of that state for an injunction to restrain him from the collection of certain license fees. An injunction was granted by the Circuit Court, which was reversed in the Supreme Court principally upon the authority of *Shelton* v. *Platt*, 139 U. S. 591.

In *Indiana Mfg. Co.* v. *Kochne*, 188 U. S. 681, a bill was filed in the circuit court of the United States for the district of Indiana, to enjoin the collection of certain taxes. The bill was there dismissed. On appeal to this court, the dismissal was affirmed, and the court said (p. 684):

> "The foundation of this appeal to equity, as averred by complainant, was (1) on the ground that the assessment constitutes a cloud upon title; (2) that there is no adequate remedy at law; (3) that a multiplicity of suits is avoided; and (4) that it prevents irreparable injury to complainant.
>
> "It has long been the settled doctrine of the federal courts that the mere illegality of a tax, or the mere fact that a law upon which the tax is founded is unconstitutional, does not entitle a party to relief by injunction against proceedings under the law, but it must appear that the party has no adequate remedy by the ordinary processes of the law, or that the case falls under some other recognized head of equity jurisdiction, such as multiplicity of suits, irreparable injury, etc. *See Cruickshank*, v. *Bidwell*, 176 U. S. 73, 80, where many of the authorities upon this subject are collected in the opinion which was delivered by Mr. Chief Justice Fuller. See also *Pittsburgh, etc., Railway* v. *Board of Public Works*, 172 U. S. 32, where Mr. Justice Gray dealt with the subject quite fully. We must judge the case at bar under the rules laid down by the authorities cited."

The court then discussed the several grounds alleged. The plaintiff owned no real estate and consequently there could be no cloud upon title. The statute authorized suit for the repayment of taxes illegally collected, and that was determined to be an adequate remedy. Upon the ground that the action would prevent a multiplicity of suits, this court said (p. 689):

> "The remedy provided by the state of Indiana is in truth but one proceeding, and all the complainant had to do in order to avail itself of such remedy was to appear before the board of review when the assessment was first made and object to it, and if its objections were overruled, then to appeal to the state board, and if that board also overruled the objection, then to pay the tax. The proceeding thereafter is one suit commenced by application to the board of county commissioners to recover the tax wrongfully assessed, and if the claim were refused, then the party might go into the circuit court, and if refused again, it had the further right of appeal, and if still refused, it then had the right of review by writ of error from this court, if any Federal question had been decided against it. The right to come into a Federal court and invoke its equitable jurisdiction in order to avoid the remedy thus provided by the state cannot, under these facts, be founded upon the alleged prevention of a multiplicity of suits. The claim on such ground is without foundation."

In answer to the claim that irreparable injury was threatened, it was said (p. 690):

> "There is a general averment that to enforce the tax by distraint and sale of complainant's property would result in irreparable injury, but there is no fact stated from which it could be inferred that irreparable injury would be likely to result from such enforcement, and where a plain and adequate remedy to recover the amount is given by statute no such irreparable injury can be inferred."

Singer Sewing Mach. Co. v. *Benedict*, 229 U. S. 481, was an action by a New Jersey corporation to enjoin the col-

lection of taxes in the city and county of Denver. The case was instituted in the Federal District Court where it was dismissed, the Circuit Court of Appeals affirmed the decision and the case was brought to this court on appeal. In its decision of affirmance this court used the following language (pp. 484-485):

> "In the courts of the United States it is a guiding rule that a bill in equity does not lie in any case where a plain, adequate and complete remedy may be had at law. The statute so declares, Rev. Stat., Sec. 723, and the decisions enforcing it are without number. If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection sua sponte, and in other cases it is treated as waived if not presented by the defendant in *limine*. *Reynes* v. *Dumont*, 130 U. S. 354, 395; *Allen* v. *Pullman's Palace Car Co.*, 139 U. S. 658. There was no waiver here. The objection was made by the demurrer and again by the answer, and so, if it was well grounded, it was as available to the defendants in the Circuit Court of Appeals to prevent a decree against them there as it was in the Circuit Court. *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276.
>
> "In the last case it was said of the pertinency of the guiding rule in cases such as this (p. 281): 'A notable application of the rule in the courts of the United States has been to cases where a demand has been made to enjoin the collection of taxes or other impositions made by state authority, upon the ground that they are illegal or unconstitutional. The decisions of the state courts in cases of this kind are in conflict, and we need not examine them. It is a mere matter of choice of convenient remedy for a state to permit its courts to enjoin the collection of a state tax, because it is illegal or unconstitutional. Very different considerations arise where courts of a different, though paramount, sovereignty interpose in the same manner and for the same reasons. An examination of the decisions of this court shows that a proper reluctance to interfere by pre-

vention with the fiscal operations of the state governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired. It has been held uniformly that the illegality or unconstitutionality of a state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such a case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable and efficient as the remedy in equity.'"

And further (p. 486-487):

"We refer to these cases, not as defining the jurisdiction in equity of the Circuit Court, for that they could not do (*Payne* v. *Hook*, 7 Wall. 425, 430; *Whitehead* v. *Shattuck*, 138 U. S. 146; *Smythe* v. *Ames*, 169 U. S. 466, 516), but as showing that the Colorado statute gave to one who should pay illegal taxes a right to recover back from the county the money so paid. This right was one which could be enforced by an action at law in the Circuit Court, no less than in the state courts, if the elements of Federal jurisdiction, such as diverse citizenship and the requisite amount in controversy, were present. *Ex parte McNiel*, 13 Wall. 236, 243; *United States Mining Co.* v. *Lawson*, 134 Fed. Rep. 769, 771. Thus it will be perceived that, if the taxes in question were illegal and void, as asserted, the company had a remedy at law. It could pay them and, if the commissioners refused to refund, have its action against the county to recover back the money. Such a remedy, as this court often has held, is plain, adequate and complete in the sense of the guiding rule before named, unless there be special circumstances showing the contrary. *Dows* v. *Chicago*, 11 Wall. 108, 112; *State Railroad Tax Cases*, 92 U. S. 575, 613-614; *Shelton* v. *Platt*, 139 U. S. 591, 597; *Allen* v. *Pullman's Palace Car Co.*, Id 658, 661; *Indiana Manufacturing Co.* v. *Kochne*, 188 U. S. 681, 686."

Keokuk & Hamilton Bridge Co. v. *Salm*, 258 U. S. 122, was an appeal from the district court of the United States for

the southern district of Illinois, to review a decree of dismissal in a suit to enjoin the collection of a tax. The Keokuk & Hamilton Bridge Company, an Illinois corporation, owns a bridge across the Mississippi River, that part of which, lying within the state of Illinois, was assessed by the county assessors for purposes of taxation as real estate. The bill alleged that the property was deliberately assessed at 150 per cent of its actual value, whereas the property of other corporations and individuals was assessed at only 40 per cent of its value. A motion to dismiss was sustained by the district court, on the ground that the complainant had a plain, adequate and complete remedy at law. On appeal to this court it was said (p. 124) in affirming the decision:

> "But the bill failed to show that plaintiff was being deprived of property without due process of law, or was being denied equal protection of the laws, or that there was any danger that it would be. Compare *Wells, F. & Co.* v. *Nevada*, 248 U. S. 165, 168, 63 L. Ed. 190, 192, 39 Sup. Ct. Rep. 62. The law of Illinois affords ample opportunity to question the amount and the validity of an assessment, both before administrative tribunals and in its courts."

And further (125):

> "Here the alleged invalidity consists wholly in discriminatory over-valuation; and, so far as appears, appellant did not even apply to the board of review to correct the assessment. There is thus no basis for the contention that resort to a suit such as this was necessary to prevent either a sale for an illegal tax creating a cloud upon title, or multiplicity of suits to recover back the tax, or other irreparable injury."

In connection with *Keokuk & Hamilton Bridge Company* v. *Salm*, we refer to the case of *Wilson et al.* v. *Illinois Southern Railway Company et al.*, decided January 14, 1924, by this Court. The court distinguished the two cases. In the former,

the taxes of a single county were involved; in the latter, those of five counties were involved. Five suits at law would have been necessary, and in addition, "there would be insuperable difficulty in determining what the proper assessment against the whole road should be and in apportioning the due share to the county concerned."

In the present case no such difficulty can arise. One suit, and that expeditious and inexpensive, would determine every issue for all of the seventy-two counties interested. This case is fully within the principles enunciated in the Salm case.

This Court also referred to the provision of the new Illinois statute for an appeal from the state tax commission to the state Supreme Court and said, "How far such an appeal would be adequate upon a charge of fraud against the Commission may be doubted, and the adequacy of a remedy at law must be clear."

The section of the statute referred to is as follows (Sec. 115, Chap. 120, Cahill's Ill. Revised Statutes, 1921):

> "Any person feeling himself aggrieved by any assessment made by the tax commission may appeal to the Circuit Court of the County in which such property or some part thereof is situated, for the purpose of having the lawfulness of such assessment inquired into and determined.
>
> "The person taking such appeal shall file with the tax commission written notice of such appeal, which notice shall state in full the grounds of such appeal. Such notice of appeal shall be filed within ten days after such assessment is made and notice given thereof. Thereupon the tax commission shall prepare and transmit to the clerk of the court to which such appeal is taken a copy of such notice of appeal, and a copy of all evidence, documents, papers, books and files pertaining to such appeal, which copies shall be certified to as correct by the Director of Finance. The appeal shall be heard without formal plead-

> ings upon the record so certified by the tax commission. Appeals shall lie from the judgment of the Circuit Court to the Supreme Court. The remedy by appeal herein provided for shall not be construed to be exclusive."

Two causes render the Illinois statute ineffective. First: The remedy provided is not exclusive. Under the decisions it is established in Illinois that an injunction may be granted when a tax is not authorized by law, when it is assessed upon property not subject to taxation, and when property has been fraudulently assessed too high.

Mich. Central Railroad Co. v. *Carr*, 303 Ill. 354.
Sanitary Dist. v. *Young*, 285 Ill. 351.
The Peoples Gas Light Co. v. *Stuckart*, 286 Ill. 164.

As injunction is a proper remedy and as the statute still recognizes it as such a litigant may institute his suit as well in Federal court as in a state court. There is no remedy by injunction in such cases in Nebraska.

Second: No power to entertain such an appeal is vested in the Supreme Court of Illinois under the Constitution of that state. The Constitution provides (Sec. 1, Art. 9), in part, as follows:

> "The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise * * *."

In *The Public Life Insurance Co.* v. *Pollak*, 75 Ill. 292, it is said, in considering the constitutional provision above quoted (p. 294):

> "Thus it will be seen that all power to fix a valuation is taken from each of the departments of the government. It is unmistakably vested in the persons elected under the

requirements of the statute, and it can only be fixed by them, and not otherwise. The legislative branch of government could not exercise this power, nor could the executive, because the constitution has not only vested it in the persons elected, as directed by the general assembly, but all other persons, bodies, departments, or such bodies combined, are expressly prohibited from performing that duty.

"Nor is there any power, expressed or implied, by which the courts can fix a valuation, or review the action of the assessors. They are invested with the sole power, and we are aware of no authority to review their action. The law has not, nor can it, in view of this constitutional provision, empowered the courts to fix the valuation of property for taxation.

The Burton Stock Car Co. v. *Traeger*, 187 Ill. 9.
The People v. *Millard*, 307 Ill. 556.

It is said by appellant (brief p. 50) that

"the law of Nebraska offered appellant no opportunity to question the amount or validity of its assessment either before administration tribunals or courts."

The record in this case shows that there was an extensive hearing before the state board on complaint filed by appellant (Tr. pp. 106-142).

The decision in *Chicago, Rock Island & Pacific Railway Company* v. *State*, *supra*, disposes of all other criticisms by appellant in connection with *Keokuk & Hamilton Bridge Co.* v. *Salm*, *supra*.

The following cases also illustrate the principles applicable when an adequate remedy is provided by the state:

Milwaukee v. *Koeffler*, 116 U. S. 219.
Burrill v. *Locomobile Co.*, 258 U. S. 34.
Pullman Co. v. *Tamble*, 173 Fed. 200.
McLaughlin v. *St. Louis R. Co.*, 232 Fed. 579.

McDougal v. *Mudge*, 233 Fed. 235.
Missouri P. R. Co. v. *Conway, et al.*, 280 Fed. 401.
Long v. *Norman*, 289 Fed. 5.

VIII. Section 266 of the Judicial Code.

Section 266 of the federal judicial code is in part as follows:

> "It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the state having jurisdiction thereof under the laws of such state, to enforce such statute or order, accompanied by a stay in such state court of proceedings under such statute or order pending the determination of such suit by such state court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the state. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the state, that the suit in the state courts is not being prosecuted with diligence and good faith."

Under the laws of Nebraska, taxes are not collected by suit. Delinquent corporation taxes may be collected from any agent holding money of the corporation by summary process, or taxes may be collected by sale of property.

The equity jurisdiction of the Federal courts is uniform throughout the Union, and if its processes may be stayed by the institution of a suit in a state court in some of the states, it would appear that it would be just to conclude that an error proceeding providing a remedy in advance would be regarded at least as favorably as a suit to enforce collection. This view is strengthened by the fact that courts of equity will adopt remedies provided by state statutes if consistent with equitable principles. No stay of proceedings can be involved in the error proceeding as the cases would have been finally determined long before the statutory liens attached.

The error proceeding appears to meet all that congress intended to require.

Dawson v. *Kentucky Dist. Co.*, 255 U. S. 288.

IX. Authorities of Appellant Discussed.

Appellant alleges that equity jurisdiction exists in this case in order to avoid a cloud upon the title to its property, to prevent a multiplicity of suits and irreparable injury. Appellant might have availed itself of the remedy provided in section 5901, Comp. St. 1922, immediately after its property was assessed, on May 1, 1922. If the petition in error had been promptly filed the case would probably have been disposed of in the Supreme Court of the state of Nebraska, before the date of the levy of taxes in July; at any rate, long before the time that the lien would have attached. The statutory remedy by petition in error would not only have avoided all other suits, but would have also obviated the necessity of bringing in the county officers, made parties in this suit. One suit would have disposed of the entire case. There are general allegations as to the irreparable injury, but, if the statutory remedy had been followed, there could have been no injury. The entire argument of appellant proceeds upon the theory that it was injured because there was no remedy. It failed to pursue the remedy under the statute which is not only plain, adequate and complete but is also highly expeditious. The Federal district court was fully justified in determining that the remedy under the state statute was sufficient.

A few of the cases cited by appellant will now be referred to:

In *Union Pacific Ry. Co.* v. *Cheyenne*, 113 U. S. 516, the doctrine of the *State Railroad Tax Cases, supra*, was fully recognized, but the court held that under the allegations of the bill it was necessary to resort to equity in order to avoid a multiplicity of suits.

Raymond v. *Chicago Traction Co.*, 207 U. S. 20, originated in the Circuit Court of the United States for the northern district of Illinois, where an injunction was granted against certain tax assessment. Upon appeal to this court the decree was affirmed. The assessment was made by the state board of equalization, but from the decision of the board there was no appeal and such decision was conclusive except as relief might be had by injunction. This court said (p. 38):

> "Undoubtedly if there be a complete and adequate remedy at law in such a case as this, the remedy in equity will not be recognized. Assuming the tax to be void, equity will not restrain by injunction its collection, unless there be some other ground for equitable interposition."

In *Cummings* v. *Bank*, 101 U. S. 153, cited by appellant, the statute of Ohio especially provided injunction as a remedy for taxes illegally assessed. No such remedy exists in Nebraska for excessive assessment.

Section 6018, Compiled Statutes of Nebraska, 1922, provides:

> "No injunction shall be granted by any court or judge in this state to restrain the collection of any tax or any part thereof, hereinafter levied, nor to restrain the sale of any property for the non-payment of any such tax, except such tax or the part thereof enjoined be levied or assessed for any illegal or unauthorized purpose * * *."

The statutes afford a plain, adequate and complete remedy to one whose property is excessively valued for taxation and no suit for injunction will lie by reason of such assessment.

Western Union Tel. Co. v. *Douglas Co.*, 76 Neb. 666.
Hahn System v. *Stroud*, (Neb.) 190 N. W. Rep. 572.

Greene v. *Louisville & Interurban Ry. Co.*, 244 U. S. 499, was an action instituted in the District Court of the United

States for the Eastern District of Kentucky to enjoin certain taxes. The court held that the statute of Kentucky did not give an adequate remedy. The court said (p. 520):

> "But, by a line of recent decisions in the Kentucky court of appeals, the effect of this section has been confined to cases where the taxes paid either were wholly without warrant in law or were based upon a mistake as to the rate of taxation upon the amount assessed; and it has been held not to authorize the auditor to correct erroneous assessments, since that official is not intrusted with authority to make assessments."

Smythe v. *Ames*, 169 U. S. 466, cited by appellant, decided that the provision of the Nebraska statute providing for an action did not prevent jurisdiction of the Federal courts. The court referred (644) to section 5 of chapter 72, article 12, of the Statutes of Nebraska for 1893 as not affording an adequate remedy. The provision was in part as follows:

> "Whenever any railroad company or companies in this state shall, in a proper action show by competent testimony that the schedule of rates prescribed by this act are unjust and unreasonable, such railroad or railroads shall be exempt therefrom as hereinafter provided. All such actions shall be brought before the supreme court, in the name of the railroad company or companies bringing the same, and against the state of Nebraska, and upon the hearing thereof, if the court shall become satisfied that the rates herein prescribed are unjust in so far as they relate to the railroad bringing the action, may issue their order directing the board of transportation to permit such railroad to raise its rates to any sum in the discretion of the board; Provided, That in no case shall the rates so raised be fixed at a higher sum than that charged by such railroad on the first day of January, 1893."

It will be observed the statute was an attempt to confer legislative power upon the court and that it went so far as

to limit the board of transportation to rates in force upon a specified date.

Union Pacific R. R. Co. v. *Board of County Commissioners of Weld County, Colorado, et al.*, 247 U. S. 282, was a suit by the Union Pacific Railroad Company to enjoin the collection of a portion of the taxes levied on its property in Weld County, Colorado, the complaint being that the company's property was assessed at one-third of its value, while most of the other property was assessed at one-fifth, and some not at all, and that this operated to place an undue burden of taxation on the company in violation of the constitution and laws of the state and contrary to the due process and equality clauses of the Fourteenth Amendment. A portion of the tax was conceded to be valid and was paid. An application for temporary injunction was denied by the district court and that interlocutory order was affirmed by the circuit court of appeals upon the ground that there was a plain, adequate, and complete remedy at law. The case, however, was not dismissed. An appeal to the Supreme Court of the United States was attempted, but dismissed and the matter was determined on petition for certiorari. For many years the revenue laws of Colorado contained this provision (p. 284):

> "* * * and in all cases where any person shall pay any tax, interest or costs, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, or clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer."

This court, in discussing the statute, said (p. 285):

> "If that section is still in force, unqualified and unmodified, the conclusion below that in this case there is a plain, adequate and complete remedy at law, and there-

fore that relief by injunction is not admissible, is fully sustained by our decisions. *Singer Sewing Machine Co.* v. *Benedict*, 229, U. S. 481, and cases there cited; *Pittsburg, etc. Ry. Co.* v. *Board of Public Works*, 172 U. S. 32; *Arkansas Building & Loan Assn.* v. *Madden*, 175 U. S. 269; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 38; *Johnson* v. *Wells, Fargo & Co.*, 239 U. S. 234, 243; *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 519.

"That the taxes were levied for state, school district and town, as well as for county, purposes is not material; for it is apparent from the Colorado statutes and decisions that the section covers broadly the whole of the tax that is found to have been erroneous or illegal, regardless of the purpose for which it was levied and placed on the county tax roll. And it also is immaterial that the taxes were made a lien on the company's real property, for the lien would be effectually removed by paying them and suing to recover back the money. *Allen* v. *Pullman's Palace Car Co.*, 139 U. S. 658, 661; *Arkansas Building & Loan Assn.* v. *Madden, supra*, 273.

"Whether the section named is still in force, unqualified and unmodified, is the important question."

The court, after discussing certain amendments, continued (p. 287):

"An examination of the new statute shows that the controversy just outlined is not without some real basis and that its solution is not free from difficulty. The question is purely one of state law, and, so far as we are advised, the supreme court of the state has not passed on or considered it. A ruling by us on the question would neither settle it for that court nor be binding in an action to recover the tax if paid. In these circumstances it cannot be said that the company certainly or plainly has an adequate and complete remedy at law. On the contrary, the existence of such a remedy is debatable and uncertain. And this being so, the situation is not one in which cognizance of the present suit properly can be declined."

X. CONCLUSION.

Under the Statutes of Nebraska, as interpreted by the Supreme Court of the state, there is afforded a plain, expeditious, adequate and complete remedy at law to the tax-payer feeling aggrieved. Such remedy avoids a multiplicity of suits, prevents injury and likewise prevents any lien attaching to the property, or in any event holds the enforcement of such lien in abeyance until the procedure under the statute is fully completed. More than that, it is more favorable to the tax-payer than a suit in equity, because being a direct proceeding relief is afforded if the decision of the state board be manifestly wrong, or if there be lack of reasonable uniformity in the assessment of different classes of property, whereas equity will not act unless fraud either actual or constructive is shown.

Under the repeated decisions of this court and cited above the remedy provided by the laws of Nebraska is plain, adequate and complete.

Appellees earnestly ask that the decision of the district court be affirmed.

Respectfully submitted,

O. S. SPILLMAN, Attorney General of Nebraska,
GEORGE W. AYRES, Assistant Attorney General,
HUGH LAMASTER, Assistant Attorney General,
Solicitors for Appellees.

APPENDIX.

OPINION OF THE SUPREME COURT OF NEBRASKA

(Filed December 31, 1923).

IN RE EQUALIZATION OF PROPERTY OF C. R. I. & P. R. Co.

CHICAGO, R. I. & P. R. Co.

v.

STATE.

Number 23693.

1. While the Constitution, section, Art. VIII, requires that "taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises," and the statute, section 5820, Comp. St. 1922, requires that all property be assessed at its actual value, an assessment will not be set aside merely because all property has not been assessed at its actual value, provided that the assessment has been made with reasonable uniformity and proportion upon all classes of property.

2. The exclusion by the assessing authorities of "labor costs" in the valuation of improvements upon lands is not warranted by law, and the exclusion of "labor costs" from the value of such improvements when no such exclusion of "labor costs" is made in the valuation of improvements upon railroad property is erroneous, there being no authority of law for such discrimination.

3. In 1920 the valuation of lands and improvements as returned to the state board of equalization and assessment by the county boards averaged more than 68 per cent of the actual value. The state board adopted 68 per cent as a basis for equalization purposes and reduced the valuation accordingly. The valuation of lands and improvements for 1921 and 1922 as returned to the board was much reduced

from the value fixed by the assessment of 1920, which valuation is based, as stated by the board, upon investigations made in 1919 and 1920 "previous to the land boom, and does not cover the period of the highest prices." In 1923 the total reduction from the 1920 valuation was $357,196,797. *Held*, that, under the evidence, the assessment of land in 1923 still remained at about the same percentage of its actual value as in the reduced assessment of 1920.

4. *Held*, further, that, based upon the evidence in the record, the valuation made by the board in 1923 of the property of the complainant railroad was made "at its full actual value," or more.

5. To assess one class of property at 68 per cent to 75 per cent of its actual cash value, and to value the property of another taxpayer at 100 per cent of its actual cash value, constitutes an unlawful discrimination, which is prohibited by the constitution and statutes of the state.

6. While there may be other elements or factors upon which to determine the value of that portion of the line of an interstate railway within this state than those in evidence before the state board of equalization and produced in these proceedings, this court in reviewing the action of such board can only determine the value from the facts in evidence before the board, and those of which it is entitled to take judicial notice.

7. Since there is no evidence that the portion of the line of the complainant railroad extending into other states is of more or less value than the portion of the line in this state, and there is nothing in the record to indicate that this method of allocation is unfair or unjust, the value of the portion in this state may be determined upon a mileage basis, in the proportion that the number of miles in this state bears to the mileage of the whole system.

8. There are no settled or infallible rules for the ascertainment of the actual value of railroad property for the purpose of taxation. Approximation to actual value is all that can reasonably be expected. If the value fixed by the state board bears a similar proportion to the actual value that the valuation of other property does, such a valuation for assessment purposes is valid.

9. Where a collateral attack is made upon the validity of a tax or of an assessment, by injunction, mandamus, or like proceedings, those attacking its validity must show that the valuation was fraudulently made or that there was an intentional discrimination made between classes of property or taxpayers. But where the proceedings of such a board are reviewed in the supreme court upon error proceedings in the same case, the order of the board, like the judgment of a court in a law case, may be set aside if it is manifestly wrong, and the proceedings remanded to the assessing body for the correction of the error made.

Heard before Morrissey, C. J., Letton, Dean, Day and Good, JJ., Shepherd, district judge.

LETTON, J.:

This is a proceeding in error under Section 5901, Comp. St. 1922, to review the assessment for taxation made by the state board of equalization and assessment of that part of its property and franchises required by law to be assessed by that body. The complainant alleged in its petition for a hearing before the state board that all property in the state other than railroad property has been valued for assessment purposes by the county authorities at not to exceed 50 per cent of its actual value; that the law provides that the property of complainant be also valued on the same basis as used for the valuation of all other classes of property; that if the tentative assessed valuation of its property be not

reduced to the same percentage of actual value as other property, or unless all other property be valued and assessed by increasing the value to the percentage at which the complainant's property has been assessed, complainant would be denied the equal protection of the law, and its property would be taken for public use without just compensation and without due process of law. It alleges that the tentative assessment of $10,694,409, made on June 15, 1923, is in excess of the actual value of the complainant's property, which does not exceed $5,186,920, and that this valuation should be further equalized with the assessment of other property in the state. The complainant requested that the board either reduce the valuation of its property to the same percentage of actual value as other property, or that it increase the valuation of all classes of property in each county to the same percentage at which the complainant's property has been assessed. Other railroad companies filed similar complaints. A hearing was had and at its conclusion the board adhered to the tentative valuation.

The testimony on behalf of the railroad companies was in substance as follows: That an investigation was made for them of the sales prices of land in 72 counties for the year ending April 1, 1923. The instructions to the examiners were to omit all transactions that appeared to be the closing up of a farm sale or transfer, and conveyances between parties who were members of the same family, or for natural love and affection, or consideration of love and one dollar. No judicial sales or sales under process were included. The investigation covered 3,227 deeds, the number of acres sold was 648,475, and the total consideration shown by the deeds was $42,411,493. The assessed valuation of the same land in 1922 was $23,730,780. The average sale price per acre was $65.40, and the average assessed valuation per acre on the same land was $36.59, being 56.9 per cent of the sales value. It was not shown which of the sales were for cash or upon

terms. There was no assessment of real estate required under the statute in 1923. The 1922 assessment remains except for improvements placed upon the land within the tax year of 1922-1923. Investigation was also made with regard to mortgaged lands. The valuation placed upon the property by the owners, the appraisement made by the loan companies and the assessed valuation were compared. In these counties the owners' valuation was $60,854,436; the appraisement made by the loan companies was $49,004,938, and the assessed valuation for 1922 was $24,905,799. The assessed value was 40.9 per cent of the owners' valuation, and 50.8 per cent of the loan companies' appraisement. There was also introduced a large number of affidavits of different landowners in the respective counties, all substantially to the effect that in each county the affiant had personally investigated the lands transferred in said county from April 1, 1922, to March 31, 1923, so as to acquaint himself with the actual sale price, location and market value of the land. A list of transfers is attached, and the affiants swear that, in their opinions arrived at from actual observation and from information obtained from grantees of some of these transfers, the market value on March 31, 1923, was on the average 100 per cent of that shown by the deeds.

Exhibit 11 was received in evidence. This exhibit contains the evidence and proceedings had before the state board in 1922, the year in which the present assessment of real estate was made. By this it is shown that, as the result of its own investigation in 1919 and 1920, the board of equalization and assessment found and determined, as to real property, for the year 1920, that "the valuations as returned by the county boards averaged 68 per cent of the real valuation as determined by the ratio process." This ratio of 68 per cent of the actual value of real estate was adopted by the board as the basis for equalization purposes. Before this meeting

of the board, at its request, a tentative plan of equalization between the counties of lands and improvements had been prepared by the secretary of the state board of equalization and the secretary of the department of finance. Part of this report is as follows: "Before the assessment period began, a list of the transfers of lands in the different counties, *from July 1, 1918, to July 1, 1919*, was secured from the proper county officials. The list as sent in gave the number of transfers, the description of the land, number of acres, consideration, and 1919 assessed value of the same acres. When these lists were received, they were carefully checked over and transfers which plainly showed they were not *bona fide* sales were not used in compiling the average sale value for the county." The following statement was made and published by the board:

"In the matter of equalization between counties, the state board has adhered to the early announced plan of accepting for valuation purposes the average value placed on lands and improvements by the precinct and county assessing officials. For equalization between counties, the value returned by the assessing officials of each county has been compared with the average real value, as established by the ratio process, based on *bona fide* sales from July 1, 1918, to July 1, 1919. The equalization of the counties on the basis of the sale average was requested of the board at the meeting of the assessing officials of the counties held July 20, 1920. The ratio process, used in correcting the sale averages, is the plan used by Wisconsin for a number of years, and Minnesota and other states have adopted the same plan.

"Under this plan of equalization, the state board has the combined judgment, as to value, of the assessing officials of the counties and of the buyers and sellers of real estate for a year's period. *The year taken was previous to the land boom and does not cover the period of the highest prices.*

"The valuations as returned by the county boards *averaged 68% of the real value,* as determined by the ratio process, and the *state board adopted this 68%* as the basis for equalization purposes. * * *

"That the board has adhered very closely to the above plan is shown by the fact that the average real value, as determined by the ratio process, for the state was $94.33, and the average value for assessment purposes $64.98, or 68%.

"Under this plan, the board has accepted and adopted the average valuation of the local assessing officials. In making this equalization the state board has decreased the total value of lands and improvements of the state $91,317,444, or $18,263,549 assessed value." In 1920 land was assessed at one-fifth of its actual value.

The law was changed in 1921 so that all real property was required to be assessed in 1921 and 1922, and every second year after 1922, "which assessment shall be used as a basis of valuation for taxation until the biennial assessment." Laws 1921, Ch. 125, approved March 11, 1921. This act was no doubt passed because it was believed that there had been a decline in the value of farm lands and that the former assessment was not a proper measure of the actual value of the land in 1921. In 1921, following the passage of this act, the board issued a statement to the county assessors, a part of which is as follows: "The unexpected passage of this emergency law makes it impossible for this department to follow up with any figures to assist you and you will have to rely on last year's figures, together with your knowledge of your local county, and, in addition to this, follow instructions from this department and the law governing your duties." Instructions were also sent out by the state tax commissioner to county assessors to "value any improvements that may have been added to or removed from any parcel

of land or lot where such improvement is of the value of $100 or more," and that in "arriving at the value for added improvements it would seem to be equitable to *exclude from the value of such improvements the labor costs* of such improvements." It is to be presumed that the assessors followed the instructions of the tax commissioner, the secretary of the state board, and did not assess the labor costs of the improvements made during the years following these instructions.

The effect of this action of the board and of these instructions is shown by the report of the state auditor for 1922. The total assessed valuation of land and improvements for 1920 was $446,328,959, reduced to $428,894,670 by the board. This was upon a valuation of 20 per cent of the actual value. The actual value was therefore considered to be $2,144,473,350, while the assessed valuation for 1921, based on actual value, was $1,831,048,878, a reduction of $313,424,472 from the previous assessment, although this included the value of added improvements, less "labor costs." In 1922 there was again a reduction of $77,736,568, making a total reduction of $391,161,040, exclusive, presumably, of the "labor costs." The exclusion of these must have made a large added reduction. Why labor costs, which are ordinarily considered to be about one-third of the cost of building above the cost of material when the material is on the ground, should be excluded from the value of the improvements to lands, and no such exclusion of labor costs be made in the valuation of improvements made upon railroad property, is unexplained. The board made no change in the returns, so it is to be presumed that about one-third of the value of improvements upon lands was omitted from the valuation. These instructions show an intent to discriminate between these respective classes of property, which was erroneous, and, since never withdrawn, they must be considered in fixing a relative equality of valuation.

The assessment of 1920, as equalized, adopted 68 per cent of the actual value of farm lands and improvements as the basis of valuation. The state board on July 25, 1921, passed a resolution fixing the railroad valuation at the same as that fixed by the board in May, 1920, reciting, "considering the fact that land and improvements outside of the railroad right of way, in 1920, was increased approximately 62 per cent over that of the prior year, and it having been assumed by the board at the time of fixing the valuation of the railroads in May of 1920 that the general average increase obtained in the state would not exceed 40 per cent, and for a further reason that the land constituting the right of way of the railroad companies is, to the minds of the board, a better grade of land than the general average in the state, and is improved to the extent that it is graded for the accomodation of the rolling stock of the companies, and to which no consideration has heretofore been given, and from the fact that the average reduction over 1920, per acre, as returned by the assessing authorities is approximately 15.51 per cent, that by allowing the railroads to be and remain as fixed by the state board heretofore in May, 1920, will result in a fair and an equal valuation as compared to farm lands generally in the state." We have not been able to ascertain on what, if any, evidence this finding was made.

In 1922 the assessing resolution adopted merely expressed in general terms that the board, having taken into consideration all the facts required to be supplied by the railroad companies, from all the information which they were able to obtain, "do hereby ascertain, appraise, fix and assess for the purpose of general taxation the *full actual value* of the property of each of the several systems or companies in the state of Nebraska as hereinafter recited," fixing the value of the property of complainant at $10,694,326. There is in evidence a formula which was used by the state board in 1922

in determining the value of the property of appellant in this state, which is as follows:

"ROCK ISLAND.

Net earnings in Nebraska.....	$ 118,480.83 deficit
Assessment	11,502,985.00
6% of which is.....	690,179.10
This added to deficit gives.....	808,659.93
This deducted from $11,502,985 gives....	10,694,326.00

Or assessment for 1922."

The exhibit was received without objection, but neither complainant nor counsel for the state board have been able to explain why this manner of assessment was adopted.

On June 15, 1923, the following resolution was adopted by the board:

"Whereas, the various railroad companies operating in Nebraska have requested of this board a reduction in the valuation of their property for assessment purposes this year, and whereas, it is not possible under the statute to revalue farm property and other real estate until next year, and whereas, the records disclose that the percentage of increase in the assessed valuation of farms, homes and other forms of real estate has been out of proportion to that of other property, and that the percentage of the taxes paid by the railroads is not in excess of their proportionate share of the total taxes paid by all classes of property, be it therefore resolved, that the application for a reduction in the valuation of railroad property be denied."

The board also resolved that it "do hereby ascertain, appraise, fix and assess for the purpose of general taxation the *full actual value* of the property of each of the several systems or companies in the state of Nebraska as hereinafter

recited: Chicago, Rock Island & Pacific Railway Co., 245.51 miles of track; total actual value $10,694,409." At the hearing on the complaint it was stated by the secretary of the board that this resolution was based upon a table prepared by him. This table is in evidence as Exhibit No. 9. It compares the assessed valuation and the actual valuation of farm lands and improvements, town lots and improvements, and railroad property from 1902 to 1922, inclusive. The statement purports to show that the assessed valuation of farm lands from 1902 to 1920, inclusive, increased 377.62 per cent, while the increase in the value of railroad property was only 136.4 per cent. One of the tax experts of the complainant testified that he had made an analysis of the figures in Exhibit No. 9. He called attention to the fact that 1902—the year in which the secretary takes the actual value as five times the assessed value, and from which he draws the conclusion that from 1902 to 1922, the increase in value of farm lands and improvements was 377.62 per cent—land was only assessed at about one-tenth of its value, instead of one-fifth. The new statute requiring one-fifth of the value to be taken was not in force until September, 1903. So that in this respect the percentage of increase submitted to the board and adopted by it as a basis of comparison with the increase in the value of railroad property as assessed by the state board is fallacious. He further testifies that the increase in railroad mileage between 1902 and 1922 was 526.98 miles, or 9.3 per cent, while the increase in acreage of farm lands between 1902 and 1922 was 41.4 per cent, and that the average assessed value of improved land in Nebraska for 1902 was $3.71 per acre as shown by the report of the state auditor for that year, page 159.

A number of affidavits from taxpayers in many counties of the state are in the record, substantially to the effect that the assessed valuation in 1922 was 100 per cent of the real

value of the land, and that lands have decreased in value since that time.

Objection was made by the state that the railroad companies did not at the time when the assessment of real estate was made, that is, 1922, object to these assessments. But the record shows that complaint was made in 1922, and that statistics were produced showing a disproportion between the sales value and the assessed valuation of lands, but that the 1922 assessment was made as hereinbefore set forth. From a consideration of all the evidence, and in consideration of the reduction from the assessed valuation of land and improvements made in 1920, which assessment was made, as the board recites, "before the boom period of land sales," and which was only 68 per cent of the actual market value of the lands, and the later omission of labor costs in the valuation of improvements, we are convinced that the percentage of assessed valuation of lands and improvements to actual value remains about as it was in 1920.

We must now consider upon what basis the assessed valuation of the property of the complainant was made, and whether, as the board recites in its resolutions of 1921 and 1922, it is based upon the actual value of the property. The law requires that all property be assessed "at its actual value" which is defined to be "its value in the market in the ordinary course of trade." Comp. St. 1922, Sec. 5820. If, however, as between two classes of taxpayers, the property of each is assessed at a lower value but at the same proportion of its actual value, there is no ground for complaint on the part of either. But if the property of one is valued at its actual value and that of another at only 68 per cent of its actual value, inequality results and an unjust and unlawful exaction is made. *State* v. *Osborne*, 60 Neb. 415. At the time the tentative assessment of June 15 was made the state board had before it the report of the complainant required to be made

by the statute. Comp. St. 1922, Sec. 5841. This report, with supplementary information, shows the entire mileage of the system to be 7,635.13. It is conceded by the state that the total mileage of track operated by the complainant in this state is 250.41, of which it owns 241.51 miles. The report shows that there is $129,556,489 of paid-up capital stock, that its actual market value is $78,411,431.76, and the total amount of obligations, including notes given for equipment, is $262,411,305.98. In addition to this, the report contains the number of acres of right of way, an enumeration of property subject to be locally assessed, situated outside the right of way, and also an account of the equipment used in the state. We are unable to determine upon what basis the tentative assessment was made by the board. At the later hearing upon the complaint, the complainant introduced Exhibits Nos. 1 to 5, inclusive, estimating the value of the entire line on five different bases—the par value of stocks and bonds, market value of stock and bonds, the value of the line as represented by the net railway operating income capitalized at 7 per cent, the value as represented by the annual rental paid by the government capitalized at 7 per cent, and the property investment as determined by *ex parte* 74 of the interstate commerce commission. These values range from 199 millions in gross figures to 375 millions, which represents the par value of the stocks and bonds and equipment notes.

A number of decisions have been cited as to what elements should govern in the valuation of railroad property. There seems to be some conflict as to the proper rule to be adopted, especially with regard to valuation for rate making purposes. We believe that, in reviewing the action of the board, we must consider only those elements of value, the existence of which rests upon the facts in evidence. We may not act upon mere conjecture or theory, which, though the theory may be sound, can only be apprehended by an explanation made by some witness conversant with the intricacies of

railroad accounting. No such explanation was made. The following methods of valuation are presented by the record. They do not possess all the elements or factors generally required by the courts, but they are all that were before the state board, and, since we are merely reviewing their action, we cannot consider any others.

The market value of the corporate stock of the railroad company, together with the value of its bonds and of its outstanding obligations for the purpose of equipment, represents in a sense the market value of the entire property, although other elements should enter into the valuation, since the value of stocks and bonds fluctuates frequently from extraneous causes. The report to the state board shows that the market value of the stock is $78,411,431.76; that the total amount of the funded debt and outstanding equipment notes is $262,411,305.98, making the total indebtedness and the market value of the stock $340,822,737.74. Again, the net railway operating income for 1922 is in evidence. The value of the property may in one sense be considered to be the amount of capital investment which will produce that amount of income at the rate of 5¾ per cent per annum, which is considered by the interstate commerce commission to be a fair rate of return on such an investment, or at 6 per cent which we consider to be a fair rate. It was stipulated in open court by the parties that the net income from the operation of the railroad for 1922, after payment of taxes, equipment rents, track rents, and operating expenses, was $13,934,468.51. Assuming that a net income of 6 per cent per annum is a fair return upon the capital invested, we may consider as one estimate of the value $232,241,141.83.

There is a discrepancy between the original report to the board and Exhibit No. 2 introduced at the hearing, with respect to the market value of the stocks and the amount of the funded indebtedness and equipment notes. In the origi-

nal report this is placed at $340,822,737.74, while in Exhibit No. 2 it is placed at $286,981,456. The par value of the stocks and securities of the entire system is $375,529,812. The evidence shows that $10,463,501 of the stock was not paid up, leaving the total par value of the paid-up stock and the outstanding obligations $365,066,311. A statement made to the interstate commerce commission as of October 1, 1919, shown in Exhibit No. 5, places the entire property value at $343,802,202. Averaging all of these figures, we are satisfied that the value of the entire system is not less than about 314 million dollars. None of these outstanding obligations include claims for damages, wages, interest, and other liabilities which are payable out of income and which do not represent investments in property.

There are other elements of value which, under the decisions, should or might be considered, but we are confined to the proofs which were actually before the board. The rule in *Smythe* v. *Ames*, 169 U. S. 466, 547, stated by Mr. Justice Harlan, is as follows:

"The original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property."

In *State* v. *Savage*, 65 Neb. 714, 757, the question how the value of railroad property shall be assessed is considered, and it is said by Judge Holcomb:

"While conceding that the market value of the stocks and bonds of a railroad corporation may not always furnish the best evidence, or the exclusive criterion of the value of the corporate property, it cannot, we think, be gainsaid that the amount and value of such stocks and bonds, if not subject to extraneous influences, would very generally, if not uniformly, be a most important factor in the determination of the value of the corporate property which they represent, and should receive due consideration, with other pertinent evidence, in reaching a correct conclusion as to the actual value of such property."

In *State Railroad Tax Cases*, 92 U. S. 575, 605, it is said by Mr. Justice Miller:

"It is therefore obvious that, when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock."

The next important question is how much of this value should be allocated to the property of the complainant in Nebraska. The report shows that the main track mileage operated in this state is 250.41. There being no evidence to show any difference in the relative value of the mileage in this state as compared with that in other states, it is not improper under this state of the record to distribute the value upon a mileage basis. In *Wallace* v. *Hines*, 253 U. S. 66, and *Davis* v. *Wallace*, 257 U. S. 478, in which an excise tax, which was apportioned on the ratio which the mileage within the state of North Dakota bore to the entire mileage of the system, and in which the bill of complaint alleged that on

account of the differences of value of the line in the region through which the road passed in North Dakota, from its value in the more densely populated portion of the country in which its valuable terminals lay, the value of the mileage in North Dakota was very much less than the value of the mileage in other states, the Supreme Court of the United States held that, under these facts, the ratio which the mileage in North Dakota bore to the entire mileage was not a fair method of determining the value of that part of the system lying in North Dakota.

The evidence upon which the state board of equalization acted in this case shows no such disparity in value or difference in conditions between the mileage of the Rock Island road in Nebraska and in other states. So far as appears there is nothing unjust or unfair in ascertaining the value of the property of the railroad in Nebraska by comparison of the amount of mileage of main track in this state with the amount of mileage of main track operated in its entire system. The rule is as stated in *Fargo* v. *Hart,* 193 U. S. 490: "A state cannot tax the privilege of carrying on commerce among the states. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other hand, it can tax property permanently within its jurisdiction although belonging to persons domiciled elsewhere and used in commerce among the states. And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the state in taxing, even though the other parts of the system are outside of the state. The sleepers and rails of a railroad, or the posts and wires of a telegraph company, are worth more than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole. This being clear, it is held reasonable and constitutional to get at the worth of such a line, in the

absence of anything more special, by a mileage proportion. The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in the state to the whole system." See *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 439; *Illinois C. R. Co.* v. *Greene*, 244 U. S. 555.

On the basis of the value of 314 million dollars for the entire system, the value per mile of the operated main trackage is $40,951. The operated mileage in Nebraska is 250.41, which, upon a mileage allocation, makes the total value of the property of the complainant in Nebraska $10,254,539. The property outside of the right of way locally assessed, which is not assessable by the state board, amounts to $70,273, leaving the value of the assessable property in this state, on this basis, $10,184,266. Some of the lines operated by complainant are owned by subsidiary companies of which it owns all or a large part of the stock, some are leased lines, and upon some of the operated property it has merely trackage rights. However, value inheres in both the trackage rights and in the leases. The value of the whole property must be considered. The statements of value contained in this opinion are only approximate, and not intended to limit or control the state board if or when it becomes necessary to assess or reassess the value of a complainant's line of railroad in Nebraska. The board is entitled to ascertain all the facts which are necessary upon which to base its judgment as to value, and it is the duty of the railroad company whose property is to be assessed to make a full fair and complete statement of all relevant facts, and to assist the board to make a fair valuation. The subject of the valuation of railroads is a different one. Neither railroad commissioners, nor taxing authorities, nor courts have as yet arrived at settled or infallible rules or criteria for the ascertainment of actual value

of such property. Approximation is all that can reasonably be expected.

The Constitution, Section 1, Art. VIII, requires that "taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises." It is impossible to secure absolute uniformity in the valuation of property for taxation, more especially where it belongs to different classes. The most that any assessing officer or board can do in this direction is to make a valuation in such a reasonable manner, having regard to all the circumstances, as to show that the intention was not to create disparity but to secure uniformity. And if, after indulging the presumption that the assessing authorities have been endeavoring to perform their difficult and arduous duties in good faith and with impartiality, the differences and discrepancies are not so great or so obvious as to indicate that there has been a substantial error to the prejudice of the complainant, the assessment will not be disturbed. *State* v. *Savage*, 65 Neb. 714. On the other hand, if it is shown by the evidence that the property of one person, individual or corporation, has been assessed out of a reasonable and fair uniformity with that of other property and that the disparity is so great that it violates the requirement of the constitution, then a reviewing court may and should remand the proceedings to the assessing board for correction in order to make the percentage of assessed valuation to actual valuation of all classes and kinds of property as nearly as possible the same. *Sioux City & P. R. Co.* v. *Washington County*, 3 Neb. 30; *McGee* v. *State*, 32 Neb. 149; *State* v. *State Board*, 81 Neb. 139; 2 Elliott, Railroads (3d Ed.) 280, 281, 282. As to error from such tribunals, see *Mathews* v. *Hedlund*, 82 Neb. 825; *Munk* v. *Frink*, 75 Neb. 172.

The valuation for the year 1923 of lands and improvements, as shown by the records of the tax commissioner, is $33,964,244 greater than the valuation for 1922. The total reduc-

tion from the assessed value of such property in 1920 (which valuation, as the board has stated, was made before the great increase in land values) is $357,196,797 a reduction of about 16 per cent from a valuation made on a basis of 68 per cent of actual value. From a careful consideration of all the facts in evidence, we are of the opinion that the valuation of the property of complainant lacks reasonable uniformity with the assessment of lands and improvements; that, as the record recites, the railroad property has been assessed at "full actual value," and that the other class mentioned has been assessed at a much lower percentage. This being the case, the property of complainant should be revalued as nearly as possible at the same percentage of actual value as all other property.

Having come to this conclusion, the finding and order of the state board of equalization and assessment of the value of complainant's property is set aside and the proceedings are remanded to that body for further proceeding in accordance with law. While Section 5882, Comp. St. 1922, seems to apply specifically to where "any tax or part thereof levied under the provisions of this article shall be adjudged illegal and nonenforceable, or shall be set aside by any court of competent jurisdiction on any ground whatever," and specifies what the duty of the board shall be as to reassessing and redetermining the value in such case, the procedure prescribed for such cases seems to be well adapted to such a case as this, where the assessment of the property of the complainant has been decided to lack uniformity with that of other classes of property. We desire in this connection to call special attention to Section 5842, Comp. St. 1922, which gives the board power to consider all facts and information not contained in the reports made by the railroad companies. Where such information is considered, the source from which it has been obtained should, so far as possible, be mentioned in the record, so that a reviewing court may

consult the same sources and thus stand in the shoes of the assessing body.

REVERSED AND REMANDED.

THE STATE OF NEBRASKA, ss.

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that I have compared the foregoing copy of an opinion filed by said Court on the 31st day of December, 1923, with the original on file in my office and that the same is a correct transcript thereof, and of the whole of said original.

In Testimony Whereof, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 16th day of January, 1924.

(Seal) H. C. LINDSAY,
Clerk.

Statutes, Section 1070: "Terms of the Supreme Court shall be held at the capitol, beginning on the first Monday in January and third Monday in September of each year."

Rule 1 of the Supreme Court of Nebraska: "1. *Sittings of the Court.*—The regular public sessions of this court will be held on the first and third Mondays of each month at 9 o'clock a. m., standard time, during each term."